No. 06-677

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In The

Supreme Court of the United States

GEORGE NICHOLAW,

Petitioner,

v.

INFINITY BROADCASTING,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District

PETITIONER'S REPLY BRIEF

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

After *Ash v. Tyson Foods, Inc.*, in lawsuits alleging claims of age discrimination, what is the standard for determining whether a comparison of qualifications suffices to show that the defendant-employers' asserted nondiscriminatory reasons for their hiring decisions were pretextual?

PETITIONER'S REPLY BRIEF

Petitioner George Nicholaw ("Petitioner") has more than forty years of distinguished experience in news radio broadcasting management. Yet he was not selected by Respondent Infinity Broadcasting ("Respondent") for the position of Vice-President and Market Manager of Respondent's news radio stations KNX and KFWB. Instead, Respondent selected another man who is twenty years younger than Petitioner, and had no experience managing an all-news radio station. Alleging that Respondent discriminated on account of age, Petitioner sued Respondent.

Respondent argues it is an "illusion" that lower courts articulate various standards for inferring pretext from defendant-employers' claims of superior qualifications. (Brief in Opposition ("Oppn. Br.") at 20.) Yet this Court has found that lower courts, indeed, articulate various standards. *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197-98 (2006). Moreover, research shows that post *Ash*, the lower courts have continued to follow their pre-*Ash* patterns of articulating various standards. *Barnette v. Chertoff*, 453 F.3d 513, 518 (D.C. Cir. 2006); *Brooks v. County Comm'n*, 446 F.3d 1160, 1161 (11th Cir. 2006); *Tippie v. Spacelabs Med., Inc.*, 180 Fed. Appx. 51, 52 (11th Cir. 2006), *petition for cert. filed* (No. 06-304); *Truss v. Harvey*, 179 Fed. Appx. 583, 583 (11th Cir. 2006); *Roper v. City of Foley*, 177 Fed. Appx. 40, 42 (11th Cir. 2006); *Price v. M & H Valve Co.*, 177 Fed. Appx. 1, 4 (11th Cir. 2006); *Hubbard v. M & H Valve Co.*, 180 Fed. Appx. 899, 899 (11th Cir. 2006); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006). Accordingly, this case concerns the persistent differences in the manner in which lower courts actually decide whether claims of unlawful discrimination merit a trial.

One of the elements of Petitioner's prima facie case under the test established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is that he is qualified for the position of Vice-President and Market Manager of KNX

and KFWB. Respondent, in its opposing brief here, rewrites its prior concession that Petitioner established the prima facie case. Page 16, footnote 4, of Respondent's Brief in the Court of Appeal below states that "[Respondent] did not argue in its motion for summary judgment, and does not argue in this brief, that [Petitioner] failed to make out a prima facie case. . . . " Whereas, the Respondent's revision here at page 4, footnote 2, of its opposing brief, states "Respondent did nothing of the sort . . . Respondent did dispute Petitioner's qualifications. . . . " (Oppn. Br. at 4 n.2.) Respondent's revision shows Respondent's belated reluctance to accept that the trial court below determined (Appendix ["App."] at 23), and the Court of Appeal implicitly agreed (App. at 10), that Petitioner presented satisfactory evidence establishing that he is qualified for the position of Vice-President and Market Manager of KNX and KFWB.

Respondent's attempt to shift its concession shows the flaws in its opposition to the petition. Respondent's rewrite (Oppn. Br. at 4 n.2, *i.e.*, that "Respondent did dispute Petitioner's qualifications. . . . ") concedes that a triable issue of material fact exists concerning Petitioner's qualifications in comparison to those of the younger man Respondent selected for the position. Respondent's rewrite also shows the importance and substantiality of the question presented, in that Respondent is uncertain about whether to concede or contest the prima facie case without knowing the standard for inferring pretext from a defendant-employer's claim of superior qualifications.

Respondent, citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945), argues that the Court's opinion will be advisory because the Respondent believes the Court of Appeal, on remand, will reaffirm the summary judgment by applying California state law. (Oppn. Br. at 19-27.) Respondent's belief is wrong. First, as mentioned above, the trial court and the Court of Appeal agreed that Petitioner presented sufficient evidence to establish that he was qualified for the position of Vice-President and Market Manager of

KNX and KFWB. Second, the summary judgment is not based on a California state law ground that is independent and free of federal law. (App. at 8-9.) Indeed, a straightforward reading of the Court of Appeal's opinion shows that the decision rests primarily on or interweaves federal law. (*Id.*) Moreover, Respondent concedes that the Court of Appeal below cited "state cases interpreting and applying [the *McDonnell Douglas*] test." (Oppn. Br. at 13.) For example, the Court of Appeal cited *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317 (2000) and *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 798 (Cal. Ct. App. 1999). (App. at 9-12.) Both cases clearly rest primarily on or interweave federal law. *Guz*, 24 Cal. 4th at 353-78; *Horn*, 72 Cal. App. 4th at 805-17. In addition, the Court of Appeal relied on *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918-19 (9th Cir. 1996), *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993), and *Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990). (App. at 12-13.)

In footnote 8 on page 14 of its opposing brief, Respondent argues that California has, quoting Respondent, a "unique standard for summary judgment." Respondent cites *Guz*, 24 Cal. 4th at 380. (Oppn. Br. at 14 n.8.) Yet Respondent is citing Justice Joyce Kennard's concurring and dissenting opinion, which does not suggest, let alone establish, a "unique" California standard of any kind. Indeed, Justice Kennard confirmed that California state law interweaves or rests primarily on federal law in cases of age discrimination. *See Guz*, 24 Cal. 4th at 380.

Faced with no independent and adequate state ground for the Court of Appeal's decision below, Respondent attempts to evade this Court's jurisdiction by citing *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965). Yet in sharp contrast to *Jankovich*, the decision of the Court of Appeal below flowed from federal law. (App. at 8-12.) Indeed, the organization and language of the opinion indicates that California state law is not an "equal ground" of decision as federal law. *Compare Jankovich*, 379 U.S. at

490-91 *with* App. at 8-12 (citing *Guz*, 24 Cal. 4th at 353-78 and *Horn*, 72 Cal. App. 4th at 805-17), which makes clear that California law rests primarily on federal law in the area of age discrimination.

Respondent argues that *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984) is inapposite (Oppn. Br. at 15 n.9), and *Michigan v. Long*, 463 U.S. 1032 (1983) is distinguishable, because, according to the Respondent, the Court of Appeal below relied "exclusively" (quoting Oppn. Br. at 17) on California state law. A straightforward reading of the Court of Appeal's opinion shows, however, that the Court of Appeal decided Petitioner's claim by interweaving or resting primarily on federal law. (App. at 8-12.) Accordingly, this Court's teaching in *Three Affiliated Tribes* applies to this case: "This Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes*, 467 U.S. at 152. In sum, the Court has jurisdiction to grant the petition here.

Respondent argues that the Court of Appeal, on remand, will determine that the evidence is not sufficient to merit a jury trial because the Court of Appeal has decided that the disparity in qualifications between the Petitioner and the younger man is based solely on Petitioner's "subjective personal belief." (Oppn. Br. at 22-23.) A straightforward reading of the record shows, however, that the disparity in qualifications comes not from Petitioner's "subjective personal belief," but from (a) undisputed evidence that supports the trial court's (App. at 23) and Court of Appeal's (App. at 10) finding that Petitioner established that he was qualified for the position of Vice-President and Market Manager of KNX and KFWB (Petition for Writ of Certiorari at 4-5, citing Appellant's Appendix in the Court of Appeal, Volume II, page 304, lines 7-19 [hereafter, *e.g.*, AA:II:304:7-19]; AA:II:354:6-19, AA:II:403:5-9; AA:II:403:13-21), and (b) undisputed evidence that shows the younger person had no experience managing an all-news radio station (AA:I:286:18 – 287:4).

Respondent's opposing brief argues that this Court must resolve the factual dispute between the parties. (Oppn. Br. at 19-26.) Respondent is wrong. The Court need only formulate the standard for inferring pretext from a defendant-employer's claim of superior qualifications. On remand, the California Court of Appeal below should determine whether the evidence is sufficient under that standard for Petitioner to have his claim of age discrimination decided by a jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Petitioner